

1 **UNITED STATES DISTRICT COURT**

2 **DISTRICT OF NEVADA**

3 BANK OF AMERICA, N.A.,

4 Plaintiff

5 v.

6 FOUR WINDS OWNERS' ASSOCIATION,
et al.,

7 Defendants

Case No.: 2:16-cv-00884-APG-NJK

**Order (1) Granting Bank of America's
Motion for Leave to File Supplemental
Authority, (2) Denying TPZ's Motion for
Summary Judgment, (3) Granting Bank of
America's Motion for Summary Judgment,
(4) Dismissing as Moot Bank of America's
Damages Claims, and (5) Denying as Moot
Four Winds' Motion for Summary
Judgment**

[ECF Nos. 56, 57, 58, 59]

11 Plaintiff Bank of America, N.A. sues to determine whether a deed of trust encumbers
12 property located at 8225 Romantic Sunset Street in Las Vegas following a non-judicial
13 foreclosure sale conducted by a homeowners association (HOA), defendant Four Winds Owners'
14 Association (Four Winds). Bank of America seeks a declaration that the HOA foreclosure sale
15 did not extinguish the deed of trust and it asserts alternative damages claims against Four Winds
16 and Four Winds' foreclosure agent, defendant Nevada Association Services, Inc. (NAS).
17 Premier One Holdings, Inc. purchased the property at the foreclosure sale and counterclaimed to
18 quiet title. Premier later transferred the property to defendant TPZ Lu, Ltd. (TPZ), so the parties
19 stipulated to substitute TPZ for Premier. ECF No. 55.

20 The parties move for summary judgment on a variety of grounds. Bank of America also
21 moves for leave to file supplemental authority. The parties are familiar with the facts so I will
22 not repeat them here except where necessary to resolve the motion. I grant Bank of America's
23 unopposed motion for leave to file supplemental authority. I deny TPZ's motion for summary
judgment and grant Bank of America's motion because Bank of America was excused from

1 making a formal tender because NAS had a known policy of rejecting tender payments for the
2 superpriority amount. Because the HOA sale did not extinguish the deed of trust, I dismiss as
3 moot Bank of America's alternative damages claims against Four Winds and NAS, and I deny as
4 moot Four Winds' motion for summary judgment.

5 I. ANALYSIS

6 The Supreme Court of Nevada recently resolved a case on materially indistinguishable
7 facts. *7510 Perla Del Mar Ave Trust v. Bank of America, N.A. (Perla)*, 458 P.3d 348 (Nev. 2020)
8 (en banc). In *Perla*, Bank of America, through its counsel Miles, Bauer, Bergstorm & Winters,
9 LLP (Miles Bauer), sent a letter to the HOA's foreclosure agent, which in that case was also
10 NAS, requesting the superpriority amount and offering to pay that amount. *Id.* at 349. NAS
11 received the letter but did not respond to it. *Id.* Instead, NAS proceeded with the foreclosure
12 sale. *Id.* There was evidence that at the time Miles Bauer sent the letter to NAS in March 2012,
13 NAS had a policy of rejecting checks "for less than the full amount if it was accompanied by a
14 condition," and Miles Bauer was aware of NAS's policy. *Id.* The Supreme Court of Nevada held
15 that "[b]ecause NAS had a known policy of rejecting any payment for less than the full lien
16 amount, . . . the Bank's obligation to tender the superpriority portion of the lien was excused, as
17 it would have been rejected." *Id.* at 351. Excuse of tender, like tender itself, cures the default of
18 the superpriority portion of the lien by operation of law. *Id.* at 350 n.1.

19 Here, Bank of America, through Miles Bauer, sent a letter to NAS in March 2012
20 requesting the superpriority amount and offering to pay that amount. ECF No. 58-6. NAS did
21 not respond. Just like in *Perla*, NAS's Rule 30(b)(6) witness, David Stone, testified in another
22 case that during the relevant time period, NAS would not accept checks from Miles Bauer that
23

1 had conditional language and every check NAS received had that conditional language.¹ ECF
2 No. 58-10 at 7, 10. This is consistent with the evidence in *Perla* that showed that within this
3 same time frame, NAS had a policy of rejecting Miles Bauer tender attempts and that Miles
4 Bauer was aware of this policy. 458 P.3d at 349-50. “As a result, [Bank of America] was
5 excused from making a formal tender in this instance because, pursuant to NAS’s known policy,
6 even if the Bank had tendered a check for the superpriority portion of the lien, NAS would have
7 rejected it.” *Id.* at 352. Consequently, Bank of America “preserved its interest in the property
8 such that [TPZ] purchased the property subject to the Bank’s first deed of trust.” *Id.*

9 Because Bank of America was excused from making a formal tender, its interest in the
10 property was preserved by operation of law and the HOA foreclosure sale is void as to its deed of
11 trust. *Id.* at 350 n.1, 352; *see also Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d
12 113, 121 (Nev. 2018) (en banc) (Because “valid tender cured the default as to the superpriority
13 portion of the HOA’s lien, the HOA’s foreclosure on the entire lien resulted in a void sale as to
14 the superpriority portion.”). TPZ’s “status as a [bona fide purchaser] is irrelevant when a defect
15 in the foreclosure proceeding renders the sale void.” *Bank of Am., N.A.*, 427 P.3d at 121.

16 TPZ contends that Bank of America was not excused from making a tender attempt
17 because the Bank could have called Four Winds directly and Four Winds would have accepted
18 payment. But Four Winds designated NAS as its foreclosure agent and the foreclosure notices
19 directed interested parties to contact NAS. ECF Nos. 58-4; 58-5. TPZ cites no authority for the

21 ¹ TPZ objects that Stone’s deposition testimony from another case is inadmissible. However,
22 Federal Rule of Civil Procedure 56 does not require that evidence be presented in admissible
23 form at summary judgment. *See Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (“At the
summary judgment stage, we do not focus on the admissibility of the evidence’s form. We
instead focus on the admissibility of its contents.”). Bank of America could present testimony
from Stone or some other NAS representative, and nothing suggests that the testimony would be
any different in this case than what was presented in the other case or in *Perla*.

1 proposition that Bank of America should have ignored the directions in the foreclosure notices
2 and instead should have contacted the HOA directly, as opposed to the HOA's specifically
3 designated foreclosure agent. Moreover, when asked whether the HOA had a policy concerning
4 superpriority payments, Four Winds' Rule 30(b)(6) witness testified that "payments were
5 accepted based on the opinion of the third party that [the HOA] hired to collect them," meaning
6 NAS. ECF No. 56 at 88.

7 The HOA foreclosure sale did not extinguish the deed of trust and TPZ took title to the
8 property subject to the deed of trust. As a result, I dismiss as moot Bank of America's
9 alternative damages claims against Four Winds and NAS, and I deny as moot Four Winds'
10 motion for summary judgment.²

11 **II. CONCLUSION**

12 I THEREFORE ORDER that plaintiff Bank of America, N.A.'s motion for leave to file
13 supplemental authority (**ECF No. 59**) is **GRANTED**.

14 I FURTHER ORDER that defendant TPZ Lu, Ltd.'s motion for summary judgment
15 (**ECF No. 56**) is **DENIED**.

16 I FURTHER ORDER that plaintiff Bank of America, N.A.'s motion for summary
17 judgment (**ECF No. 58**) is **GRANTED**. The clerk of court is instructed to enter judgment in
18 favor of plaintiff Bank of America, N.A. and against defendant TPZ Lu, Ltd. as follows: It is
19 hereby declared that the non-judicial foreclosure sale conducted by Four Winds Owners'
20 Association on November 30, 2012 did not extinguish the deed of trust and the property located
21 at 8225 Romantic Sunset Street in Las Vegas, Nevada remains subject to the deed of trust.

22
23 ² I decline to consider arguments Four Winds raises for the first time in its reply brief. ECF No. 66; *Vasquez v. Rackauckas*, 734 F.3d 1025, 1054 (9th Cir. 2013).

1 I FURTHER ORDER that plaintiff Bank of America, N.A.'s alternative damages claims
2 against defendants Four Winds Owners' Association and Nevada Association Services, Inc. are
3 DISMISSED as moot.

4 I FURTHER ORDER that defendant Four Winds Owners' Association's motion for
5 summary judgment (**ECF No. 57**) is **DENIED as moot**.

6 I FURTHER ORDER the clerk of court to close this case.

7 DATED this 7th day of August, 2020.

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10

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE